

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of Application of	)	
	)	
OKLAHOMA WESTERN TELEPHONE	)	File No. 1637-CM-P-92
COMPANY	)	
	)	
For Authority to Construct and Operate a	)	
Multipoint Distribution Service Station on the F	)	
Group Channels at Clayton, Oklahoma	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 16, 2003**

**Released: April 18, 2003**

By the Commission:

1. *Introduction.* The Commission has before it an application for review<sup>1</sup> filed by Oklahoma Western Telephone Company (OWTC) on May 21, 1998. OWTC seeks review of an order of the Video Services Division (Division) of the former Mass Media Bureau.<sup>2</sup> The *Division Order* denied a petition for reconsideration of the return of OWTC's application to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F group channels at Clayton, Oklahoma. For the reasons set forth below, we deny the application for review.

2. *Background.* OWTC filed the above-referenced application for a new MMDS station at Clayton, Oklahoma on February 10, 1992. On March 3, 1993, Commission staff determined that the application was unacceptable for filing and dismissed the application.<sup>3</sup> The dismissal letter stated, *inter alia*, that OWTC had failed (1) to include interference analyses for all previously proposed or authorized MMDS stations, as required by Section 21.902(c) of the Commission's Rules,<sup>4</sup> and (2) to serve all affected parties as required by Section 21.902(g) of the Commission's Rules.<sup>5</sup> The dismissal letter also stated that OWTC's application proposed an area not open for filing, in violation of Section 21.902(d)(4) of the Commission's Rules.<sup>6</sup>

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<sup>1</sup> Application for Review of Oklahoma Western Telephone Company (filed May 21, 1998) (Application for Review).

<sup>2</sup> Oklahoma Western Telephone Company, *Order on Reconsideration*, 13 FCC Rcd 8472 (MMB VSD 1998) (*Division Order*).

<sup>3</sup> Letter from Robert James, Chief, Domestic Radio Branch, Domestic Facilities Division, Common Carrier Bureau, FCC to Oklahoma Western Telephone Company, dated March 3, 1993 (Application Return Notification).

<sup>4</sup> 47 C.F.R. § 21.902(c).

<sup>5</sup> 47 C.F.R. § 21.902(g).

<sup>6</sup> 47 C.F.R. § 21.902(d)(4). In this connection, the application failed to meet the criteria established in a 1988 public notice specifying that an applicant may not file in a geographic area of an authorized MDS station or pending MDS application. See Common Carrier Bureau Opens Filing Period for Multichannel Multipoint Distribution Service Applications, *Public Notice*, 3 FCC Rcd 2661 (CCB 1988) (1988 Public Notice).

3. On April 1, 1993, OWTC filed a petition for reconsideration of the dismissal of its application. On reconsideration, the Division affirmed the dismissal of OWTC's application for failure to comply with Section 21.902 of the Commission's Rules.<sup>7</sup> The Division found "dispositive" OWTC's failure to submit adequate, required interference studies with its application and to give notice to all required parties.<sup>8</sup> In addition, the Division stated that interference analyses are necessary at the time of application filing due to the extensive planning and engineering involved in the MDS licensing process and found that OWTC failed to file at least fifty-seven of the interference analyses required by the Rules.<sup>9</sup> The Division also stated that service upon affected parties is provided for in the Rules so that interested parties may have actual notice of a proposed station and sufficient time to respond if desired.<sup>10</sup>

4. *Discussion.* In the instant application for review, OWTC makes three primary arguments. First, OWTC contends that the Commission is treating similarly situated applicants differently, because although the public notice announcing the April 1988 filing window for E and F Group channels stated that no waivers of the 50-mile location requirement would be allowed, applications that violated this rule were accepted and granted.<sup>11</sup> Second, OWTC contends that the Commission should not have included any dismissed applications and forfeited authorizations for purposes of evaluating the acceptability of OWTC's application.<sup>12</sup> Third, OWTC contends that the Commission wrongfully applied a new engineering methodology for evaluating pending MMDS applications after the instant application was filed, resulting in a greater number of pending and authorized applications requiring interference studies than would have been found had the previous methodology been employed.<sup>13</sup>

5. We decline to consider OWTC's first argument because it did not present that argument to the Division. OWTC argues that although the 1988 Public Notice authorizing the filing of applications for new MDS facilities on the E and F group channels prohibited the filing of applications that violated location restrictions that were outlined in that public notice, "exceptions to this rule were granted."<sup>14</sup> In particular, OWTC cites to *Sioux Valley Empire Electric Association*<sup>15</sup> and notes that the application in that case was not "summarily dismissed because it proposed an area not open for filing pursuant to Section 21.901(D)(4)."<sup>16</sup> In this instance, OWTC acknowledges that it is relying on a question of law that it did not present to the Division in its petition for reconsideration.<sup>17</sup> The Commission's Rules provide, however, that "no application for review will be granted if it relies on questions of fact or law upon which

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<sup>7</sup> *Division Order*, 13 FCC Rcd at 8473 ¶ 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 8473, 8475 ¶¶ 3, 7.

<sup>10</sup> *Id.* at 8473 ¶ 3.

<sup>11</sup> Application for Review at 4-5.

<sup>12</sup> *Id.* at 8.

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> See *Sioux Valley Empire Electric Association, Memorandum Opinion and Order*, 3 FCC Rcd 7375 (1988) (*Sioux Valley*). OWTC also references the grant of an application to "G/S Lynchburg F Settlement Group, File No. 50455-CM-P-91" in 1993, but makes no effort to explain how action on that application supports its position in this case. Application for Review at 5 n.9.

<sup>16</sup> Application for Review at 6.

<sup>17</sup> *Id.* at 1.

the designated authority has been afforded no opportunity to pass.”<sup>18</sup> Accordingly, we will not consider the merits of this argument at this juncture.<sup>19</sup>

6. Furthermore, with respect to OWTC’s arguments that the Division should not have included forfeited or dismissed applications in considering its application and that the Commission’s engineering methodology was applied retroactively, OWTC has failed to demonstrate that its application complied with all of the applicable provisions of the Commission’s Rules. In particular, OWTC fails to address the Division’s conclusion that the interference study submitted for Station WMH684, Canadian Valley, Oklahoma “did not include free space calculations for the desired to undesired signal ratio to each reference receiving antenna within the protected service area of the subsequently authorized station as required by 47 C.F.R. § 21.902(f).”<sup>20</sup> OWTC also fails to address the Division’s finding that its proposed station would cause harmful interference to Station WMH684. Similarly, OWTC also does not refute the Division’s conclusion that OWTC’s application was defective because OWTC did not submit the consent from the licensee of Station WMH684 with the original application.<sup>21</sup> In light of OWTC’s failure to address those bases for concluding that its application was not acceptable for filing, we need not address the substance of OWTC’s remaining contentions. In view of the foregoing, we affirm the Division’s dismissal of OWTC’s application.

7. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission’s Rules, 47 C.F.R. § 1.115, the application for review filed by Oklahoma Western Telephone Company on May 21, 1998 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>18</sup> 47 C.F.R. § 1.115(c). *See also* Charles T. Crawford, et al., *Order*, 17 FCC Rcd 2014 (2002), *recon. denied* FCC 02-274 (rel. Oct. 4, 2002).

<sup>19</sup> *See* 1988 Public Notice at 2. Moreover, we note that the affidavit attached to OWTC’s application for review holds little probative value regarding the bare assertion that applications were accepted and granted in violation of the location restrictions described in the 1988 Public Notice. We nonetheless note that *Sioux Valley* is easily distinguishable from this case in that (1) the applications at issue in that case included the required frequency analyses at the time they were filed, and (2) the applications were filed prior to the release of the 1988 Public Notice prohibiting the filing of applications within 50 miles of any proposed or licensed MMDS station.

<sup>20</sup> *Division Order*, 13 FCC Rcd at 8475 ¶ 7.

<sup>21</sup> *Id.* at 8476 ¶ 10.